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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 11, ORIGINAL.

STATE OF NEW YORK,

Complainant,

vs.

STATE OF ILLINOIS AND SANITARY DISTRICT OF CHICAGO,

Defendants.

EXCEPTIONS TO REPORT OF SPECIAL MASTER

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Solicitor and of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1927

No. 12 Original

STATE OF NEW YORK,
Complainant,
against
STATE OF ILLINOIS and SANITARY DISTRICT OF CHICAGO,
Defendants.

The State of New York, complainant in the above entitled original cause Number 12, hereby excepts to certain of the findings of fact, conclusions of law and recommendations for a decree set forth in the report of Honorable Charles E. Hughes, Special Master herein, which findings of fact, conclusions of law and recommendations for a decree so excepted to are as follows:

EXCEPTIONS TO FINDINGS OF FACT

First.—To so much of finding of fact numbered 5, set forth in paragraph (a) at page 18 of the report wherein the Special Master finds as follows:

> "In connection with the construction of this canal, the Des Plaines River was straightened for many miles above Lockport, and its channel was improved from Lockport down through Joliet, so that it would be capa-

> ble of taking the combined floods of the Des Plaines River watershed and the Chicago River watershed, or a total of about 25,000 c.f.s."

for the reason that said finding is immaterial and if it has any materiality in this controversy, it is not a full, fair and complete finding of the facts relative to the improvement of the channel of the Des Plaines River and the Special Master should have concluded the said finding as follows:

> "but such improvements as were made in the channel of the Des Plaines River were made with a view of facilitating and increasing the abstraction of water of the Great Lakes-St. Lawrence waterway—for purposes of sanitation and not for the benefit or in aid of navigation on said River."

Second.—To so much of finding of fact numbered 5 as is contained in paragraph numbered "f" and set forth at page 21 of the Report, for the reason that the cost of the sewer system described therein, as the same appears on the books of the Sanitary District of Chicago, is not competent proof of the reasonable cost of these works, and proof of the fair and reasonable cost not having been offered by the defendants, no finding thereon should have been made.

Third.—To the statement of fact set forth at page 165 of the report herein, which reads as follows:

> "So far as the diverted water is used for the development of power, the use is merely incidental (*supra*, p. 25)."

because if said statement is intended to be or is construed as a finding of fact, it is contrary to all competent evidence herein and not supported by any competent evidence in this case.

Fourth.—To so much of finding of fact numbered 8, set forth in paragraph (u) at page 58 of the report wherein the Special Master finds as follows:

> "The Act of Congress of June 25, 1910 (36 Stat. 659, 660), appropriated $1,000,000 for the construction of a waterway from Lockport, Illinois, to the mouth of the Illinois River, and provided for the appointment by the Secretary of War of a board of five members to report on the feasibility and advisable dimensions of such waterway, and also upon such measures as might be required properly to preserve the levels of the Great Lakes and to compensate, so far as practicable, for the diminished level in these lakes and connecting waters by reason of any diversion of water from Lake Michigan. (The report of this Board, dated August 15, 1913, was transmitted to Congress on February 18, 1914. See Finding 17, *infra*, p: 125.)"

for the reason that if said finding has any materiality in this controversy, it is not a full, fair and complete finding in respect to the matter set forth therein and the Special Master should have also found as follows:

> "The said act of Congress of June 25, 1910 (36 Stat. 659, 660) was repealed at the next ensuing session of the Congress of the United States and no construction work was done

under and pursuant to the provisions of said act, nor was any part of the appropriation mentioned therein expended for or on account of any construction work."

Fifth.—To so much of finding of fact numbered 11 wherein, at page 81 of the Report, the Special Master finds as follows:

> "*Compliance with conditions of permit of March 3, 1925.*—It appears from the evidence that, up to the time of the taking of the testimony herein, the Sanitary District had substantially complied with the conditions of the permit."

for the reason that the evidence shows the diversion under said permit created an unreasonable interference with navigation contrary to the provisions of said permit, and further shows that the Sanitary District of Chicago did not carry out the program for the installation of water meters provided for by said permit, and, therefore, did not substantially comply with the conditions of the permit.

Sixth.—To so much of finding of fact numbered 16 as is set forth in paragraph (a) at page 120 of the report wherein the Special Master finds as follows:

> "The Federal project depth has been seven feet; but this could not have been maintained without at least 8,500 c.f.s. from Lake Michigan, which gives, in the lower Illinois, about four feet of the low water depth of seven feet."

for the reason that said finding is immaterial and is not supported by any competent evidence herein, and is contrary to the competent evidence in this case.

Seventh.—To so much of finding of fact numbered 16, wherein, at page 120 of the Report, referring to the Illinois Waterway, the Special Master finds:

> "There is no adequate water supply for lockage, except by diversion from Lake Michigan. Other plans would involve prohibitive expense,"

for the reason that said finding is contrary to the evidence and is not supported by the evidence.

Eighth.—To so much of finding of fact numbered 16, wherein, at page 120 of the Report, referring to the sources from which water was to be taken to make up 6,000 c.f.s. as shown by the plans for the waterway of 1920, approved by the Chief of Engineers and the Secretary of War, the Special Master finds that said flow of 6,000 c.f.s. was made up of 500 c.f.s. as an actual low water flow, 4,167 c.f.s. from Lake Michigan, and 1,395 c.f.s. as averaging the amount of Chicago's pumpage, for the reason that there is no evidence to support said finding.

Ninth.—To so much of finding of fact numbered 16, wherein, at page 120 of the Report, the Special Master finds, referring to the lower Illinois River, that if there were no diversion at Chicago, a large amount of improvements and several locks and dams would have to be provided, for the reason that there is no evidence to support said finding.

Tenth.—To so much of finding of fact numbered 16, wherein, at page 121, the Special Master quotes from the report of Colonel Judson as follows: "for a 9 foot channel, with an increment of 4,167 second-feet, the cost either with dams retained or removed appears almost prohibitive," for the reason that the finding has no materiality in the controversy, and the fact is that the recommendations made by Colonel Judson were never adopted either by the Board of Engineers for Rivers and Harbors, by the Chief of Engineers or by Congress, and the Special Master should have so found.

Eleventh.—To so much of finding of fact numbered sixteen, wherein, at page 122 of the Report, the Special Master states that he is unable to find that a diversion of less than 1,000 c.f.s. of water is sufficient to supply all the needs of navigation on the Illinois waterway from Lake Michigan to the mouth of the Illinois River, for the reason that the evidence clearly shows that 1,000 c.f.s. of water is sufficient for lockage and navigation purposes on this waterway, and the Special Master should have so found.

Twelfth.—To so much of finding of fact numbered sixteen, wherein, at page 124 of the Report, the Special Master finds that the diversion from Lake Michigan increases to some extent the navigable depth over the bars on the Mississippi River, and that it was permissible for the Secretary of War to reach the conclusion that the diversion from Lake Michigan of 8,500 c.f.s. was, to some extent, an aid to the navigation of the Mississippi River, for the reason that the evidence shows that instead of being an aid to navi-

gation on the Mississippi, the diversion of 8,500 c.f.s. from Lake Michigan is an added menace thereto, and the Special Master should have found that the Secretary of War would not have been justified in reaching the conclusion that the diversion of 8,500 c.f.s. of water from Lake Michigan had any beneficial effect on the navigation of the Mississippi River, and the Special Master should have found that there is nothing in the permit of the Secretary of War which indicates that the Secretary gave any consideration to the effect of this diversion on navigation of the Mississippi River.

Thirteenth.—To so much of finding of fact numbered sixteen, wherein, at page 125 of the Report, the Special Master finds that the Secretary of War on the application and hearing which resulted in the permit of March 3, 1925, had before him the information regarding the effect of the diversion on navigation of the Mississippi River, for the reason that the evidence shows conclusively that no part of the diversion was authorized for the purpose of improving navigation on the Mississippi River, and the evidence, the Report of the Secretary of War, and the permit itself all show clearly that the diversion was authorized for the sole purpose of relieving an assumed sanitary necessity and for the purpose of permitting the City of Chicago to dispose of its sewage through and by means of the so-called Drainage Canal.

Fourteenth.—To all of finding of fact numbered seventeen, for the reason that the construction of compensating works is not within the control of the defendants, but can only be built if and when

Congress so orders and then only by the consent of the Government of Great Britain, and for the further reason that the complainant state of New York is entitled to all the benefits which may be derived from the construction of such so-called compensation works without the diminution of such benefits by the abstraction of water from Lake Michigan by the defendants herein.

EXCEPTIONS TO CONCLUSIONS OF LAW

First.—To the second conclusion of law made and filed by the Special Master herein appearing on page 148 of the report in *haec verba:*

> "My conclusion is that the action of Illinois in diverting water from Lake Michigan through the drainage canal of the Sanitary District was, and is, unlawful unless validly permitted by Congress either directly or through the action of the Secretary of War."

and appearing in the summary of conclusions of the Special Master's Report, page 196, in *haec verba,* to-wit:

> "2. That the State of Illinois and the Sanitary District of Chicago have no authority to make or continue the diversion in question without the consent of the United States."

insofar and to the extent that said conclusion of law implies or holds that the United States might authorize the State of Illinois and the Sanitary District of Chicago, or either of them, to make or continue the diversion in question under the circumstances of this case.

Second.—To all of conclusion of law numbered third as set forth in the Special Master's Report

on pages 148 to 171, inclusive, and as summarized on page 196 *in haec verba* as follows:

> "3. That Congress has power to regulate the diversion, that is, to determine whether and to what extent it should be permitted."

for the reason that such a conclusion is contrary to law and the Special Master should have found and concluded that Congress had not been delegated power under the Federal Constitution to authorize this diversion from Lake Michigan, which was to the injury of this complainant riparian state, and to the substantial detriment of its rights and the rights of its citizens in the navigation and use of the Great Lakes-St. Lawrence waterway and which primarily was sought for and, by the Secretary of War, was permitted for the disposal of Chicago's sewage.

Third.—To all of conclusion of law numbered "Fifth" for the reason that it is contrary to law and the Special Master should have found that Congress did not and could not give authority to the Secretary of War to issue said permit for the diversion of water from the Great Lakes-St. Lawrence waterway to the Mississippi waterway, which was for the purpose of relieving sanitary conditions in the City of Chicago.

Fourth.—To all of conclusion of law numbered "Sixth" for the reason that it is contrary to law and the Special Master should have found that the Secretary of War was without authority of law to issue such a permit, and that his act was *ultra vires* and that the permit was void and of no effect.

EXCEPTIONS TO FAILURE OF SPECIAL MASTER TO FIND FACTS AS REQUESTED

First.—To the failure of the Special Master to find in accordance with its proposed finding of fact numbered "12" set forth on page 47 of this complainant state's requests to find and which reads as follows:

> "All of the abstractions of and requests for consent of Secretary of War to abstract the waters of the Great Lakes-St. Lawrence system by the Sanitary District of Chicago have been for the purpose of sewage disposal and power development."

Second.—To the failure of the Special Master to find in accordance with its proposed finding of fact numbered "13" set forth on page 47 of this complainant state's requests to find and which reads as follows:

> "The Congress of the United States has never affirmatively authorized any diversion of water from the Great Lakes-St. Lawrence watershed at Chicago through the Chicago Drainage Canal for any purpose. None of the Secretaries of War of the United States or other Federal executive officers has authorized or directed any diversion of water from the Great Lakes-St. Lawrence watershed to the Mississippi watershed by way of the Chicago Drainage Canal for purposes of navigation. All consents or permits which have been issued or granted by any of the various Secretaries of War of the United States have

been granted or issued at the request of the Sanitary District of Chicago for sewage disposal purposes. All such permits have been temporary and revocable in character and conditioned that there should be no interference with or injury to navigation. They have been reluctantly granted to meet a case of alleged sanitary necessity with obvious fear that great damage would be done to navigation and other interests."

Third.—To the failure of the Special Master to find in accordance with its proposed finding of fact numbered "17" set forth on page 50 of this complainant state's requests to find and which reads as follows:

> "From April 1, 1903, to March 3, 1925, the Sanitary District of Chicago knowingly violated each and every of the permits of the Secretary of War. (Exhibit 1111, Tr. 3361, 3362.)"

Fourth.—To the failure of the Special Master to find in accordance with its proposed finding of fact numbered "91" set forth on page 93 of this complainant state's requests to find and which reads as follows:

> "The Sanitary District of Chicago has violated the conditions of the Permit of March 3, 1925, by exceeding the limitation placed by that permit upon an instantaneous maximum diversion and by causing and continuing an unreasonable interference with navigation in the Chicago River and in all of the waters of the Great Lakes, their connecting waters and

their outlet river, from St. Mary's Falls in the St. Mary's River to tidewater in the St. Lawrence River at Quebec. (Exhibit 146.)"

EXCEPTIONS TO THE FAILURE OF THE SPECIAL MASTER TO FIND REQUESTED CONCLUSIONS OF LAW

First.—To the failure of the Special Master to find in accordance with its proposed conclusion of law numbered VII set forth at page 95 of this complainant state's requested findings of fact, conclusions of law and recommendations for a decree, which proposed conclusion reads as follows:

> "VII. That neither the plans for the building nor the construction of the Chicago Drainage Canal was ever recommended by the Chief of Engineers or authorized by the Secretary of War."

Second.—To the failure of the Special Master to find in accordance with its proposed conclusion of law numbered IX set forth at page 95 of this complainant state's requested findings of fact, conclusions of law and recommendations for a decree, which proposed conclusion reads as follows:

> "IX. That the Congress of the United States is without power to authorize the abstraction and transfer of the waters of the Great Lakes-St. Lawrence watershed to or for the benefit of the Mississippi watershed."

Third.—To the failure of the Special Master to find in accordance with its proposed conclusion of law numbered X set forth at page 95 of this com-

plainant state's requested findings of fact, conclusions of law and recommendations for a decree, which proposed conclusion reads as follows:

> "X. That the aforesaid abstraction of water from the Great Lakes-St. Lawrence waterway by the defendants, State of Illinois and the Sanitary District of Chicago, which has lowered the levels of the waters of said waterway, constitutes an unlawful obstruction to and impairment of the navigable capacity thereof."

Fourth.—To the failure of the Special Master to find in accordance with its proposed conclusion of law numbered XI set forth at page 95 of this complainant state's requested findings of fact, conclusions of law and recommendations for a decree, which proposed conclusion reads as follows:

> "XI. That the Permit of the Secretary of War, dated March 3, 1925, is *ultra vires* and void and constitutes no authority for the abstraction of the waters of the Great Lakes-St. Lawrence waterway by the State of Illinois and/or the Sanitary District of Chicago."

Fifth.—To the failure of the Special Master to find in accordance with its proposed conclusion of law numbered XII set forth at page 96 of this complainant state's requested findings of fact, conclusions of law and recommendations for a decree, which proposed conclusion reads as follows:

> "XII. That all of the permits issued by the Secretary of War prior to March 3, 1925,

are *ultra vires* and void and constitute no authority for the abstraction of the waters of the Great Lakes-St. Lawrence waterway by the State of Illinois and/or the Sanitary District of Chicago."

Sixth.—To the failure of the Special Master to find in accordance with its proposed conclusion of law numbered XIII set forth at page 96 of this complainant state's requested findings of fact, conclusions of law and recommendations for a decree, which proposed conclusion reads as follows:

> "XIII. That the Permit of March 3, 1925, does not purport to authorize, nor does it authorize, the abstraction of the waters of the Great Lakes-St. Lawrence waterway, and does not undertake to authorize the invasion or injury of the property and rights of the people of the complainant State of New York or the proprietary or quasi-sovereign rights of said state."

Seventh.—To the failure of the Special Master to find in accordance with its proposed conclusion of law numbered XIV set forth at page 96 of this complainant state's requested findings of fact, conclusions of law and recommendations for a decree, which proposed conclusion reads as follows:

> "XIV. That the permits issued by the Secretary of War prior to March 3, 1925, did not purport to authorize, nor did they authorize, the abstraction of the waters of the Great Lakes-St. Lawrence waterway, nor did they undertake to authorize the invasion or

injury of the property and rights of the people of the complainant State of New York or the proprietary or quasi-sovereign rights of said state."

Eighth.—To the failure of the Special Master to find in accordance with its proposed conclusion of law numbered XVIII set forth at page 97 of this complainant state's requested findings of fact, conclusions of law and recommendations for a decree, which proposed conclusion reads as follows:

"XVIII. That neither the Congress of the United States nor the Secretary of War by means of the Permit of March 3, 1925, or any prior Permit has appropriated or attempted to appropriate any of the waters of the Great Lakes-St. Lawrence waterways for navigation purposes in the Des Plaines, Illinois or Lower Mississippi Rivers."

Ninth.—To the failure of the Special Master to find in accordance with its proposed conclusions of law, set forth at page 16 of this complainant state's Supplemental Findings of Fact and Conclusions of Law and recommendations for a decree submitted to the Special Master, as follows:

"That the Congress of the United States is without power to authorize such abstraction or diversion of the waters of the Great Lakes-St. Lawrence watershed or waterway to the Mississippi watershed or waterway, as will interfere with, impair or obstruct the navigable capacity of the Great Lakes-St. Lawrence waterway."

for the reason that the Special Master, having found that the diversion through the Chicago drainage canal has caused a substantial lowering of the levels of the Great Lakes and their connecting waters and that the said diversion has caused substantial damage to the navigation interests of the State of New York (Report of Special Master, p. 118), should have found that Congress was without power to authorize such a diversion; that Congress had not delegated to the Secretary of War power to issue a permit purporting to authorize such a diversion and that the permit of the Secretary of War of March 3, 1925, was illegal, unauthorized and void.

EXCEPTION TO THE RECOMMENDATIONS FOR A DECREE

The State of New York also excepts to the recommendation of the Special Master that the bill of complaint be dismissed for the reason that on the facts and the law the complainant State of New York is entitled to a decree herein ordering that defendants cease, desist and refrain from abstracting any of the waters of the Great Lakes-St. Lawrence waterway or watershed through the Chicago Drainage Canal and its auxiliary channels, or through or by means of any other method, device or agency.

Respectfully submitted,

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